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In The

Supreme Court of the United States

CITY OF GARDEN GROVE, CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
ORANGE COUNTY,

Respondent,

FELIX KHA,

Real Party In Interest.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF OF *AMICUS CURIAE* CALIFORNIA NARCOTIC OFFICERS' ASSOCIATION, INC. SUPPORTING GRANT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE**

The California Narcotic Officers' Association, Inc., is a non-profit corporation dedicated to providing high-quality training for law enforcement professionals. Since 1964, CNOA has grown to become the largest non-profit training association in California, with nearly 7,000 members. Members include local, state and federal peace officers, prosecutors, law enforcement personnel and other national and international associates.

CNOA provides over 100,000 student contact hours each year and reaches out to thousands of people through regional and state training seminars and the annual CNOA training institute. CNOA and its members also recognize outstanding efforts in narcotic law enforcement and the fight against drug abuse, through awards programs. Our members are the first line of defense against the proliferation of illegal drugs in our state.

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* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Counsel for petitioner and real party have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court (nominal respondent has made no appearances below).

The decision of the California Court of Appeal in this case undermines the enforcement role of California narcotic officers in particular and police officers in general, forcing upon officers and their employing agencies the highly-objectionable and, in our view, *illegal* act of providing a controlled substance to users whose possession of the narcotic violates federal law. The decision of the California Court of Appeal has a demoralizing effect upon our members, who routinely risk their own lives and safety in order to combat the scourge of illegal drug trafficking and abuse, and we believe it is contrary to the Constitution and to the laws and public policy of the United States.

SUMMARY OF ARGUMENT

1. The California Court of Appeal has decided an important question of federal law that has not been, but should be, settled by this Court.

2. An order by a state court to the effect that local officials must cause an act to be done which would be an offense against the United States if performed by another is forbidden by both the Supremacy Clause and valid Acts of Congress.

3. Contrary to the opinion of the California Court of Appeal, the Due Process Clause of the Fourteenth Amendment cannot be construed to compel state officials to deliver federal contraband to one whose possession of it violates federal law.

ARGUMENT

1. The California Court of Appeal based its judgment on the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, thereby raising an important federal issue for this Court's determination.

A. California law exempts certain "medical" marijuana users from state prosecution for unlawful possession. Cal. Health & Safety Code § 11362.5. Under federal law, on the other hand, simple possession of marijuana is a crime. 21 U.S.C. § 844(a). The sole exception is for government-approved research projects, § 823(f). Under federal law, "marijuana has no 'currently accepted medical use' at all." *United States v. Oakland Cannabis Buyers Cooperative*, 532 U.S. 483, 491 (2001). The federal Controlled Substances Act "designates marijuana as contraband for *any* purpose." *Gonzales v. Raich*, 545 U.S. 1, 27 (2005).

At issue in the case below was whether state courts could issue mandates requiring municipalities and their police officers to return seized marijuana to the one from whom it had been seized, after state prosecution was declined based on the "medical" exemption. The California Court of Appeal ruled that Fourteenth Amendment due process principles required the return of the classified drug.

B. Although the state appellate court devoted much of its decision to a discussion of state law under which real party Kha may not be subjected to penalty

by the State for possession of "medicinal" marijuana, that court also noted that nothing in California law "*expressly* provide[s] for the return of lawfully possessed marijuana that has been seized by the police." *City of Garden Grove v. Superior Court of Orange County*, 157 Cal.App.4th 355, 386, 68 Cal.Rptr.3d 656 (2007). Ignoring the likelihood that the drafters of the state statutes deliberately refrained from trying to legislate such a provision because of the obvious conflict with superior federal law, the court defaulted to the Fourteenth Amendment Due Process Clause as the source of such a mandate. Said the appellate court:

> [T]he police cannot retain a person's property without running afoul of basic constitutional considerations. Particularly, the Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty or property without due process of law." . . . Continued official retention of legal property with no further criminal action pending violates the owners [*sic*] due process rights. . . . *Id.*, at 387.

The Court of Appeal cited several state court decisions, which themselves relied on the Fourteenth Amendment. And although the analogue due process clause of the state constitution was parenthetically referenced, "The reference[ ] to the state constitution in no way indicate[s] that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law." *Michigan v.*

Long, 463 U.S. 1032, 1044 (1983). There was no "plain statement" purporting to base the judgment on state grounds, *id.*, at 1041, and it "fairly appears that the state court rested its decision primarily on federal law." *Id.*, at 1042.

C. Moreover, by mandating that state officials facilitate the violation of federal drug law, the appellate opinion "raises significant questions as to the ability of the United States to enforce the Nation's drug laws," *Oakland Cannabis Buyers*, 532 U.S. at 489, and calls into question the state court's obedience to the command of the Supremacy Clause. U.S. Const. Art. VI, cl. 2.

D. To date, twelve states have legislated "medical marijuana" exemptions from their drug laws; therefore, the issue of the extent to which states may or may not constitutionally order local officials to commit or facilitate violations of federal law regulating marijuana affects a significant portion of the nation. State-court judges have issued contempt findings against local officers for refusing to return marijuana, creating a legal dilemma for officers who view such orders as contrary to federal law. *See, e.g.*, *Colorado v. Nord*, 377 F.Supp.2d 945 (D.Colo. 2005).

These substantial questions of constitutional due process and federal supremacy justify granting certiorari.

2. An order by a state court to the effect that local officials must cause an act to be done which would be an offense against the United States if performed by another, is forbidden by both the Supremacy Clause and valid Acts of Congress.

A. The Supremacy Clause of the Constitution of the United States does not allow state-court judges to issue rulings that directly conflict with governing federal law. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29. "[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials." [Citation.] *New York v. United States*, 505 U.S. 144, 179 (1992).

The California Court of Appeal thought the federal prohibition of the possession of marijuana had no bearing on the issue before it and that "judicial enforcement of federal drug policy is precluded in this case." *Garden Grove*, 157 Cal.App.4th at 380. To the contrary, however, the Supremacy Clause requires state courts not to issue rulings that create a conflict with, or compel a violation of, federal laws. "[S]tate courts cannot refuse to apply federal law – a conclusion mandated by the terms of the Supremacy Clause. . . ." *Printz v. United States*, 521 U.S. 898, 928 (1997). No state-court ruling may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citation.]

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996).

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

This Court has already held that the notion that California could legislate an exemption from federal drug laws "is a dubious proposition, and more importantly, one that Congress could have rationally rejected." *Raich*, 545 U.S. at 30. The California Court of Appeal was in error, therefore, in brushing aside the fact that federal law prohibits the very act of drug possession the *Garden Grove* ruling holds to be mandated by the Fourteenth Amendment. "The return of the contraband would clearly have frustrated the express public policy against the possession of such objects." *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 699 (1965).

The California Court of Appeal erroneously concluded that notwithstanding the Supremacy Clause and the categorical federal prohibition on the furnishing and private possession of marijuana, a California court could ignore federal law and order local officials to return federal contraband simply

because state law created a defense to state prosecution under the circumstances. But California law also does not criminalize the private possession of numerous other forms of federal contraband (such as counterfeit plates, forged Social Security checks and enriched isotopes of uranium-238, for example); this would hardly be sufficient justification for a state court to order any such items of federal contraband to be returned to a person from whom they had been seized. Likewise, the fact that possession of "medical" marijuana may not be punishable under California law is quite irrelevant to the issue of whether the Constitution supplies the basis for an order that it be furnished to an individual and that its possession be enabled, in violation of *federal* law.

B. The decision below was also wrong to reject petitioner's argument that city officials could not lawfully comply with an order to return federal contraband, because of the risk that they themselves could incur federal criminal liability for doing so. The Court of Appeal downplayed the possibility that state officials could be seen as aiding the commission of a federal offense, for two asserted reasons: (1) the federal statutes provide an exception for officials engaged in the enforcement of drugs laws; and (2) officials returning "medical" marijuana would not have the specific intent required under state law to be guilty of aiding and abetting a crime. *Garden Grove*, 157 Cal.App.4th at 368-69. The appellate court's reasoning is badly flawed, for at least four reasons.

First, if officers were to furnish federal contraband to one who cannot legally possess it under federal law, they decidedly would *not* be engaged in the *enforcement* of the federal law prohibiting possession; they would instead be engaged in assisting in a *violation* of federal law. This is the antithesis of "enforcement."

Second, there is no federal exemption that allows local officials to furnish marijuana to a user. The only exemption is for medical research. Local officials cannot claim exemption from federal law while aiding in its violation.

Third, in concluding that city officials need not worry about running afoul of federal law for aiding Kha in the unlawful possession of marijuana, the appellate court wrongly relied on the *California* test of aider-abettor liability under *People v. Beeman*, 35 Cal.3d 547, 561 (1984). This was basic choice-of-law error, because *state-law* principles of criminal liability do not establish whether *federal* law makes a person subject to prosecution and punishment. As the Ninth Circuit has correctly noted, "[S]tate law does not control our interpretation of a federal statute." *Streit v. County of Los Angeles*, 236 F.3d 552, 560 (9th Cir. 2001), cert. denied, 534 U.S. 823 (2001). The federal test for aider-abettor liability does not include, for example, *Beeman*'s specific-intent element. *See*, *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

Fourth, the Court of Appeal failed to appreciate that unlike California law, federal law assigns liability

in *two* different ways to those who provide assistance to another in the commission of a crime. Under 18 U.S.C. § 2, a person may be guilty as a principal by aiding and abetting (subsection (a)), *or* by "caus[ing] an act to be done which if directly performed by him or another would be an offense against the United States." (Subsection (b).) Therefore, whether or not city officials might become liable to federal prosecution for aiding and abetting Kha's illegal possession of a controlled substance, the act of possessing the drug, if performed by Kha or another, would unquestionably violate federal law, making the furnishing officials liable under § 2(b).

"Section 2(b) punishes the individual who causes a criminal act, because no crime would take place without his or her participation." *United States v. Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987). Absent the act of city officials furnishing Kha the marijuana they had seized from him, he would not thereafter be in violation of federal law. But as even the errant court below acknowledged, Kha's possession of marijuana upon receipt from city officials would immediately be "illegal under federal law." *Garden Grove*, 157 Cal.App.4th at 377.

Therefore, petitioners have substantial reasons to believe that their act of returning federal contraband to Kha would bring them within the reach of § 2. A state court should not issue an order that forces local officials to choose between violating the court order and violating federal law.

3. Contrary to the opinion of the California Court of Appeal, the Due Process Clause of the Fourteenth Amendment cannot be construed to compel state officials to deliver federal contraband to one whose possession of it violates federal law.

A. This Court has never held that Fourteenth Amendment due process requires the restoration of contraband to one from whom it was taken. State courts are not free to employ the Due Process Clause as a default means of achieving a result not mandated by that Clause, as interpreted by this Court. "[A] state court can neither add to nor subtract from the mandates of the United States Constitution." *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

B. Indeed, this Court has consistently taken the view that it requires no constitutional analysis whatsoever to conclude, *ipso jure*, that contraband may not be restored to the one who possessed it, even if unreasonably seized by authorities and made inadmissible in evidence by the exclusionary rule. "Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him." *United States v. Jeffers*, 342 U.S. 48, 54 (1951). "[S]ince this property was contraband, they have no right to have it returned to them." *Trupiano v. United States*, 334 U.S. 699, 710 (1948), overruled on other grounds, *United States v. Rabinowitz*, 339 U.S. 56 (1950). "We have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from

society." *Austin v. United States*, 509 U.S. 602, 621 (1992).

C. The Due Process Clause speaks of protecting against unfair deprivations of life, liberty or property. The California Court of Appeal considered "medical" marijuana to be legitimate "property," protected by that Clause. But this Court does not share that view: "We have held that any interest in possessing contraband cannot be deemed 'legitimate'. . . ." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). The Congress has declared marijuana to be contraband for all purposes and has provided that "no property right shall exist" in marijuana. 21 U.S.C. § 881(a)(1).

For purposes of invoking the Fourteenth Amendment Due Process Clause, therefore, neither Kha nor any other California resident has any legitimate, protectible property interest in marijuana. Accordingly, due process is not violated when officials withhold that contraband from him, and the Fourteenth Amendment does not – cannot – require those local officials to restore federal contraband to one whose possession of it violates federal law that is binding on both the possessor and state courts alike.

It is one thing for a state to legislate a "medical" defense to state drug charges; it is quite another for a state court to invoke the Fourteenth Amendment to the Constitution of the United States in support of an order compelling state officials to commit or facilitate a deliberate violation of federal drug laws.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the California Court of Appeal should be reversed.

June, 2008

Respectfully submitted,

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